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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1940**

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# No. 920

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WRIGHTSMAN PETROLEUM COMPANY, A CORPORATION, FOR ITSELF AND C. J. WRIGHTSMAN, ITS SOLE STOCKHOLDER AND BENEFICIARY IN DISSOLUTION, *Petitioner*,

*vs.*

THE UNITED STATES.

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**PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.**

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CHARLES D. HAMEL,
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THE UNITED STATES.

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

Petitioner, Wrightsman Petroleum Company, a Corporation, for itself and C. J. Wrightsman, its sole stockholder and beneficiary in dissolution, prays for Writ of Certiorari to review the judgment of the United States Court of Claims filed October 7, 1940 (R. 38).

### Opinion Below.

The opinion of the United States Court of Claims is reported in 35 Fed. Supp. 86 (R. 34).

### Jurisdiction.

The judgment of the Court of Claims was entered on October 7, 1940 (R. 38). This petition is filed under Section 240 of the Judicial Code as amended by the Act of February 13, 1925.

## Question.

The question herein presented is whether an amended claim for refund filed after the prescribed period for filing claims, and prior to the rejection of any claim by the Commissioner of Internal Revenue, is permissible where the Commissioner has already been fully apprised by audit or otherwise of the deductions and facts in support thereof claimed in the amendment.

## Statutes and Regulations Involved.

The applicable portions of the pertinent statutes and Treasury Regulations will be found in Appendix A, p. 14, *infra*.

## Summary Statement of the Matter Involved.

This suit was brought by petitioner to recover Federal income tax for the taxable year 1927. During the said taxable year petitioner owned the entire outstanding stock of certain other corporations (R. 19).

By virtue of agreements (R. 19-21; 21-23; 24-25; 26-27) providing for the assignment of certain oil and gas leases by petitioner and a subsidiary, the Osage Oil Corporation, petitioner and its said subsidiary received during the taxable year 1927 what are commonly called "in-oil payments" [1] (R. 21, 22-23, 25, 27).

On July 26, 1927, the Wrightsman Oil Corporation, another of petitioner's subsidiaries, was dissolved and at the time of its dissolution petitioner had not recovered the sum of $40,396.17 representing a portion of cash advanced by petitioner to said subsidiary (R. 27).

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[1] The provisions of the various agreements were not essentially the same in text but in substance they all provided for the payment of cash and in addition in-oil payments or payments in oil if as and when received.

On March 15, 1928, petitioner, as the parent corporation, duly filed a consolidated return of income for itself and affiliates (R. 28). Thereafter, on May 27, 1929, petitioner duly filed an amended consolidated return of income for the calendar year 1927 showing a tax liability of $12,199.81, and a "refund due" of "$15,290.68" (R. 28-29).

On August 17, 1928, the Commissioner of Internal Revenue asserted a deficiency against the Osage Oil Corporation for the year 1926 in the amount of $17,170.87. Petitioner admitted liability for additional taxes in the amount of $1,713.53 but denied liability for the balance (R. 30). On May 27, 1929, petitioner filed a claim for refund for $15,290.68 for the year 1927, setting out the foregoing facts and concluding as follows (R. 30).

> "The prosecution of this claim for refund is contingent upon the final determination by the Bureau, or other proper tribunal, that the Osage Oil Corporation is liable for such additional tax for said year 1926."

Thereafter, an investigation of all of the accounts of petitioner and its affiliated subsidiaries for the calendar year 1927 was made by an Internal Revenue Agent in Charge (R. 30). Under date of July 8, 1929, said Revenue Agent rendered to the Commissioner a report in which the Agent advised the Commissioner that petitioner claimed percentage depletion of the said in-oil payments (R. 30-31). The report contained schedules showing the amounts of the in-oil payments received by petitioner as aforesaid, and also showed the unrecovered sums advanced by petitioner to the Wrightsman Oil Company (R. 31).

Thereafter, under date of March 10, 1930, the said Internal Revenue Agent in Charge rendered a supplemental report in which he again advised the Commissioner that petitioner claimed percentage depletion on the said in-oil payments.

Thereafter, on January 27, 1931, one J. C. Wilmer, then Deputy Commissioner of Internal Revenue, advised petitioner of a proposed overassessment in its favor for the calendar year 1927 in the amount of $4,602.66 (R. 31-32).

Thereafter, on February 7, 1931, within the statutory period, petitioner filed with the Collector of Internal Revenue at Oklahoma City, Oklahoma, a supplemental claim for refund for the calendar year 1927 in the amount of $4,602.66 (R. 32). Said claim for refund referred to the foregoing letter dated January 27, 1931, from J. C. Wilmer, Deputy Commissioner, and also contained the following (R. 32):

> "The proposed refund of the Treasury Department of the United States Government in the above sum is hereby accepted by Wrightsman Petroleum Company with the specific understanding that such payment shall in no wise prejudice or conclude the rights of the said Wrightsman Petroleum Company and the Osage Oil Corporation, or either of them, to assert, demand and/or maintain its or their, or either of their, claims for refund or credit growing out of the assessment for income taxes for the years 1926 and 1927, or either of said years, against Wrightsman Petroleum Company or Osage Oil Corporation, or either of them, for said years 1926 and 1927, or either of said years."

Thereafter, on November 27, 1934, Charles T. Russell, then Deputy Commissioner of Internal Revenue, advised petitioner by letter that a redetermination of its tax liability for the calendar year 1927 showed an overassessment in favor of petitioner of $1,040.06 (R. 32).

On March 4, 1935, petitioner duly filed an amended claim in which it asked for the refund of $15,650.68 for the calendar year 1927, upon the following grounds, together with detailed facts in support thereof (R. 33):

> "(1) Additional depletion in the amount of $67,830.69 with respect to the aforesaid items of gross in-

come from retained interests in oil and gas leases, and

"(2) A loss on the liquidation of the Wrightsman Oil Company in the amount of $40,396.17."

On August 28, 1935, the Deputy Commissioner of Internal Revenue, by letter, advised the petitioner that its claim filed on March 4, 1935 would be disallowed, on the ground that it was barred by the statute of limitations (R. 33). Notice of rejection was mailed to petitioner on September 28, 1935 (R. 33).

On November 7, 1935, the Commissioner of Internal Revenue notified the petitioner by registered mail that its claims for refund were rejected to the extent not previously allowed (R. 33).

Thereafter, on July 22, 1936, the petitioner duly filed its petition in the Court of Claims (R. 1) and on October 7, 1940, the Court of Claims decided as a conclusion of law that the petitioner was not entitled to recover and its petition was dismissed (R. 33).

In its opinion (R. 24-38), the Court held that the amendment filed March 4, 1935 was not timely filed or the perfection of a timely claim. The Court held that the formal claims for refund related to different grounds for recovery and that the oral claims made to the Internal Revenue Agent did not comply with the statute.

On November 20, 1940, the petitioner filed a motion for new trial (R. 38). This motion was overruled by the Court on January 6, 1941 (R. 38).

**Specification of Errors to be Urged.**

The Court of Claims erred:

(1) In holding that under the facts and circumstances herein, the amended claim filed March 4, 1935, was not timely filed;

(2) In failing to hold that the said amendment, filed prior to the rejection of any claim, was a timely amendment of

the formal claims filed on May 27, 1929 and February 7, 1931 and the proper perfection of informal claims brought to the attention of the Commissioner of Internal Revenue in Internal Revenue Agent's reports dated July 8, 1929 and March 10, 1930;

(3) In failing to hold that the Commissioner of Internal Revenue was fully and timely apprised through examinations of petitioner's affairs, or otherwise, of deductions ultimately claimed in an amended claim for refund filed on March 4, 1935, and that the said amendment was, therefore, permissible;

(4) In dismissing the petition and failing to hold that petitioner was entitled to recover.

**Reasons for Granting the Writ.**

(1) The court below failed and refused to pass on the question of the permissibility of an amended claim for refund filed subsequent to the prescribed period for filing claims but prior to rejection of any claim where the Commissioner had already been apprised by audit and examination of the deductions claimed in said amendment and the facts in support thereof. The court, therefore, left open for decision by this Court an important question of Federal Revenue law.

This issue under the facts and circumstances, as aforesaid, has never been passed upon by this Court, but the rules applicable thereto are to be found in *United States* v. *Andrews*, 302 U. S. 517, 82 L. Ed. 398, and cases reviewed therein.[2] The pertinent precepts were stated by this Court in that case as follows (p. 524):

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[2] In *United States* v. *Andrews*, the Court reviewed its earlier decisions: *United States* v. *Henry Prentiss & Co.*, 288 U. S. 73, 77 L. Ed. 626; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 77 L. Ed. 619; *United States* v. *Factors & Finance Co.*, 288 U. S. 89, 77 L. Ed. 633; *Bemis Bros. Bag Co.* v. *United States*, 289 U. S. 28, 77 L. Ed. 1011; *George Moore Ice Cream Co.* v. *Rose, Collector*, 289 U. S. 373, 77 L. Ed. 1265.

"* * * Where a claim which the Commissioner could have rejected as too general, and as omitting to specify the matters needing investigation, *has not misled him but has been the basis of an investigation which disclosed facts necessary to his action in making a refund, an amendment which merely makes more definite the matters already within his knowledge, or which, in the course of his investigation, he would naturally have ascertained is permissible.* On the other hand, a claim which demands relief upon one asserted fact situation, and asks an investigation of the elements appropriate to the requested relief, cannot be amended to discard that basis and invoke action requiring examination of other matters not germane to the first claim." (Italics supplied.)

In the instant case following the filing of the formal claim for refund by petitioner on May 27, 1929, an Internal Revenue Agent conducted an audit and investigation of all the accounts of the petitioner and its affiliated subsidiaries for the year 1927. Under date of July 8, 1929, and March 10, 1930, the Internal Revenue Agent filed reports with the Commissioner of Internal Revenue and informed the Commissioner that petitioner claimed percentage depletion on in-oil payments received in that year.

During the course of the audit and examination, the Revenue Agent checked the in-oil payments and found them correct. At the same time, a Bureau of Internal Revenue engineer made a complete examination of petitioner's gross income from oil and gas leases including the said in-oil payments and determined an amount of alleged allowable depletion.

Through his examination, the Revenue Agent ascertained that the Wrightsman Oil Corporation had a deficit as of the date of its dissolution and that as of said date the petitioner did not receive the sum of $40,396.17, representing cash advances to said subsidiary and therefore had sustained

a loss in said amount. Also, within the statutory period and on February 7, 1931, petitioner filed with the Collector of Internal Revenue at Oklahoma City, Oklahoma, a supplemental claim for refund for the calendar year 1927 in sweeping general terms.

Thereafter, when on March 4, 1935, petitioner duly filed an amended claim for refund claiming percentage depletion on the in-oil payments and a loss sustained on the liquidation of the Wrightsman Oil Corporation, the Commissioner had already been made aware through his agent's reports that petitioner claimed depletion on the in-oil payments and that it had sustained a loss. There were already recorded in his files all the facts in support of the deductions claimed in the amendment. Had a new examination been conducted by the Revenue Agent following the filing of the amendment its path would have traversed the paths of the prior audit and research. The amendment was simply an adaptation of the relief already proved and recorded in the Commissioner's files. No additional relief was solicited.

These facts were brought to the attention of the court below on brief and in oral argument and the specific question posed whether or not the amendment of March 4, 1935, filed prior to rejection of any claim, formal or informal, was permissible since the Commissioner had been fully apprised by audit and examination of the items of deduction and the facts in support thereof ultimately claimed in the amendment. It is submitted that this exact question had not at that time been decided by, nor has it been as yet decided by, this Court.

Although the rules applicable to the facts and circumstances of this case are stated in *United States* v. *Andrews, supra,* the Supreme Court in that case expressly reserved opinion on the specific question raised herein. In that case

the taxpayer relied upon decisions of the Court of Claims in *Youngstown Sheet & Tube Co.* v. *United States,* 79 Ct. Cl. 683, 7 F. Supp. 290 (Cert. denied 293 U. S. 599, 79 L. Ed. 692), and *Con P. Curran Printing Co.* v. *United States,* 83 Ct. Cl. 431, 15 F. Supp. 153 (Cert. denied 301 U. S. 686, 81 L. Ed. 1343). As to these two cases, this Court observed as follows (p. 320):

> "*We express no opinion as to whether the result may be sustained by the fact that while the original claim was pending the Commissioner was fully apprised of the items of deduction ultimately claimed in the amendment by two complete audits of the taxpayer's affairs and accounts. A similar situation is disclosed in the second case.* The decisions were, however, put by the Court of Claims upon the same ground as in the instant case,—that a claim limited to a specified item might be amended out of time to seek a refund on account of other and unrelated items,—a view we hold untenable." (Italics supplied.)

Counsel urged in the Court of Claims that even though the question had not been decided by this Court, under the rules enunciated in *United States* v. *Andrews, supra,* as applied to the facts and circumstances of this case, the amendment of March 4, 1935, was permissible. Furthermore, during the oral argument, counsel for the Government advised the court that it would not contest the issues relating to the depletion of the in-oil payments and deduction for loss incurred through the liquidation of the subsidiary.[3]

The Court of Claims, however, did not pass on the question thus presented it in holding that the amendment of

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[3] Counsel for the Commissioner admitted to the Court of Claims that it had been definitely and conclusively settled by this Court in *Thomas* v. *Perkins,* 301 U. S. 655, 81 L. Ed. 1324 and *Anderson* v. *Helvering,* 310 U. S. 404, 84 L. Ed. 1277, that under the provisions of the assignment of the oil and gas leases herein involved, petitioner was entitled to a depletion allowance on the in-oil payments received in 1927.

March 4, 1935, was not timely filed. Nor did the court cite *United States* v. *Andrews, supra,* or any of the other decisions of this Court bearing on the question. The court seems, therefore, to have passed the issue on to this Court for adjudication.

In Mertens' *1939 Cumulative Supplement,* Paul and Mertens' *Law of Federal Income Taxation,* Section 51.17, the author makes the following observation about *United States* v. *Andrews, supra,* and *United States* v. *Garbutt Oil Company,* 302 U. S. 528, 82 L. Ed. 405, in connection with the question herein presented (p. 2414):

> "* * * These decisions still leave unanswered however, a question as to the exact circumstances under which an amendment might be made after the running of the statute of limitations in cases where the Commissioner is fully apprised, by his audit or otherwise, of the items of deduction or other adjustment ultimately claimed in the 'amended' refund claim, although it may be stated generally that such an amendment is permissible."

This question is one of importance in the administration of the Federal revenue laws and is of interest to taxpayers generally. In the decisions of this Court reviewed in *United States* v. *Andrews, supra,* and also in that case, as well as *United States* v. *Garbutt Oil Company, supra,* various situations were involved wherein the court decided that under the facts and circumstances an amendment was or was not permissible. The court did not, however, have before it the exact facts and question herein presented. A decision thereon by this Court would do much to alleviate continuous litigation which seems to have resulted from the lack of adjudication by the Supreme Court on this point.

(2) The decision of the court below is in conflict with the decision of the Circuit Court of Appeals for the Sixth Cir-

cuit in *Kales* v. *United States,* 115 F. (2d) 497, and the District Court in *Fort Pitt Bridge Works* v. *Lewellyn, Collector* (D. C. Pa., Dec. 30, 1940), 1941 Prentice-Hall Federal Tax Service, page 62,262.[4]

In *Kales* v. *United States, supra,* the Circuit Court of Appeals held that it is settled law that where a claim for refund rejectable as too general and as omitting to specify matters needing investigation has not misled the Commissioner but has been the basis of an investigation disclosing facts necessary to his action in making a refund, an amendment which makes more definite the matters already within his knowledge is permissible. Citing *United States* v. *Andrews, supra.* The court further held that a letter sent to the Commissioner within time for filing a claim for refund constituted an informal claim which was subsequently perfected by the filing of a formal claim subsequent to the statutory period.

In the instant case, the court below in its opinion states that the taxpayer informally put the Commissioner on notice that it claimed depletion on oil and gas sales but this was in the form of a protest against the "proposed additional assessment" and that this did not suffice as a claim for refund; that if the taxes were paid, notwithstanding the protest, and no claim for refund is later filed, it may well be assumed that the protest is abandoned.

In *Kales* v. *United States, supra,* the appellant stated in her letter to the Commissioner that she protested the assessment of the deficiency and was paying it under duress and solely to prevent the imposition of penalties and threatened

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[4] This Court seems to have taken cognizance of a conflict between a Circuit Court of Appeals decision and a District Court decision in a Federal Estate Tax case, decided March 3, 1941, *Maass, Ex.* v. *Higgins,* 1941 Prentice-Hall Tax Service, Par. 62,028, footnote (6).

Counsel for petitioner has received information from the United States Department of Justice that the *Fort Pitt Bridge Works* case will not be appealed by the Government.

attachment of her property. *The Circuit Court of Appeals held that appellant's letter was more than a protest, but was clear notice to the Commissioner that if he reversed his decision as to the value of certain stock, she was claiming a refund of that part of the original tax paid by her because of his March 1913 undervaluation of the said stock. That her statement was in the nature of a counterclaim. That the appellant's letter constituted an informal claim which the Commissioner did not reject for failure to comply with the Treasury Regulations and when considered in the light of all the facts and circumstances existing at the time, the formal claim filed subsequent to the statutory period was but a perfection of the informal claim and not a new and independent one. This seems clearly contrary to the decision in the instant case.*

In *Fort Pitt Bridge Works* v. *Lewellyn, supra,* the District Court held that general claims for refund amended prior to rejection by the Commissioner were timely and sufficient and therefore the taxpayer's action for recovery was not barred by the statute of limitations.

The District Court observed that a general audit was being made of the books of the plaintiff therein, for the year 1919, for the purpose of making adjustments contemplated both by the Bureau of Internal Revenue and by the plaintiff taxpayer at the time that the plaintiff therein filed its two claims with the Commissioner in November, 1923. In holding that the amendment filed prior to rejection by the Commissioner was not barred by the statute of limitations, the District Court quoted from the opinion of the Circuit Court of Appeals for the Third Circuit in *Allegheny Heating Co.* v. *Lewellyn,* 91 F. (2d) 280, as follows (p. 62,266):

> " 'From these decisions the court below drew the principle that if, in the consideration of a timely claim

for refund, the Commissioner, in the normal course of administrative procedure, is led into the field covered by a purported amendment, the latter, if filed before rejection of the original claim, will be treated as a part of such original claim, even though filed after the statute of limitations has run. This we think is a correct statement of the law.' "

It is, therefore, respectfully submitted that the decision in *Fort Pitt Bridge Works* v. *Lewellyn, supra,* is directly in conflict with the decision of the Court of Claims herein.[5]

**Conclusion.**

The question herein presented is an important one of Federal revenue law. A decision thereon will do much to relieve the uncertainty which now prevails when there arise facts and circumstances similar to those of the instant case. It would seem that this Court should decide the question once and for all. As the situation now stands, there is a conflict between the opinion in the court below and decisions in other Federal courts. It is, therefore, respectfully submitted that this petition for writ of certiorari should be granted.

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[5] It is significant that in the *Fort Pitt Bridge Works* case, *supra,* as in the instant case, the taxpayer had an admittedly meritorious cause which the Commissioner sought to disallow on the grounds that the amended claim was barred by the statute of limitations.